IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1390

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

v.

ALLEN CLAIBORNE, *et al,*

and

INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, HELPERS, ROUNDHOUSE AND RAILWAY SHOP LABORERS, AND BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Supreme Court Rule 42(3), the Chamber of Commerce of the United States of America respectfully requests leave to file a brief AMICUS CURIAE in support of the

position of the Petitioner,[1] Illinois Central Railroad, with respect to the limited issue; "Whether punitive damages may be awarded to plaintiff in a suit under the Civil Rights Act of 1964, Title 7, 42 USC, Section 2000(e), et seq. combined with suit under 42 USC, Section 1981, based on alleged racial discrimination."

In support of this motion the Chamber states:

1. The Chamber of Commerce of the United States of America is a federation consisting of over thirty-six hundred (3,6000) state and local chambers of commerce and professional trade associations, and a direct business membership of over seventy-five thousand (75,000) business firms. It is the largest association of business and professional organizations in the United States.

2. The Chamber addresses only the first question presented by the petitioner. The Chamber neither agrees nor disagrees with regard to the importance of the other questions presented in the petition.

3. In order to represent its members' views on questions of importance to their vital interests and to render such assistance as it can to judicial deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant equal employment and labor relations matters before the Supreme Court.[2] The Chamber, upon motion granted in the Court of

[1] The petitioner Illinois Central has consented to the Chamber's participation as amicus curiae. A copy of the Illinois Central letter of consent has been filed with the Court. The other parties have not given consent to the Chambers' Amicus Curiae Motion.

[2] *E.g. General Electric v. Gilbert,* 429 U.S. 125, 13 FEP Cases 1657 (1976); *McDonald v. Santa Fe,* 427 U.S. 273, 12 FEP Cases 1577 (1976); *Geduldig v. Aiello,* 417 U.S. 484 (1974); *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971); *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100,* 42 U.S. 616 (1975); *Super Tire Engineering Co. v. McCorkle,* 416 U.S. 115 (1974); *Boy's Markets, Inc. v. Retail Clerks* 398 U.S. 235 (1970).

Appeals did file a brief Amicus Curiae on the issue which it seeks to support the petition herein.

The issues to which the Chamber directs its attention in this case—whether punitive damages are available in an action brought under Title VII, and whether if not, such damages may be obtained when the same claim is brought under Title VII and 42 U.S.C. §1981—are of major interest to the Chamber's membership. The object of Title VII is remedial, not retributive. Employers are encouraged by the congressional design to remedy their employement practices by conciliation, mediation and persuasion. This process is three sided, involving the EEOC, the employee(s) and the employer. Title VII has been successful largely because the changes in employment practices which emerge from the conciliation process go further to accomplish the overall goal of Title VII—equal employment opportunities—than does individual relief for past acts of discriminaition.

The availability of punitive damages under Title VII would interject into this process an element of uncertainty that would impair it and be destructive of the broad objective of the Act. Haggling over an appropriate amount of punitive damages could become a three-sided affair among the EEOC, employer and employee(s) that would serve to void the affirmative measures that might otherwise result from conciliation. Similarly, demands for excessive sums would yield the same result as employers, faced with such uneconomic demands, would be forced to litigate rather than conciliate. Such a result, compelled by the decision of the Court of Appeals below, is not in the interest of the Chamber's members whose resources, in a manner consistent with the ultimate goal of Title VII, would better be allocated to the development of hiring and training programs designed to encourage minority employment at all levels of industry.

4. The unfortunate result compelled by the decision below is not diminished when the same claim is brought

under both Title VII and Section 1981. While an employee may forego the EEOC entirely and pursue the independent avenue of relief available under Section 1981, including punitive damages, Title VII and Section 1981 are coextensive. An employee or group of employees seeking to pursue their individual interests, including punitive and other legal damages, could frustrate the broader purposes of Title VII when these interests become intertwined. That is, there is no incentive on the part of the individual claimants to genuinely participate in the conciliation process when the failure of that process carries with it the opportunity for greater individual rewards. Since Title VII and Section 1981 are independent, an employee wishing to pursue the latter course of action should have to choose between the avenues available to him.

The issue whether punitive damages may be awarded as a remedy under the statutes involved herein is not only an important question upon which the Court has not spoken, but also one in which there is a conflict in the circuits.

Wherefore, it is respectfully moved that the Court grant leave for the Chamber of Commerce of the United States of America to participate as Amicus Curiae and file the attached brief, as Amicus Curiae, in this case.

Dated this 27th Day of March, 1979.

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America (hereinafter called "Chamber") respectfully submits this Brief Amicus Curiae in support of the petition of Illinois

Central Railroad (hereinafter called "Illinois Central") on the question presented of "whether punitive damages may be awarded to plaintiff in a suit under the Civil Rights Act of 1964, Title VII, 42 U.S.C., Section 2000(e) et seq. combined with suit under 42 U.S.C., Section 1981, based on alleged racial discrimination".[3]

The Chamber respectfully submits that the issue of whether punitive damages may be awarded in the circumstances of this case is one which affects a broad segment of the Chamber's membership. It is the Chamber's position that Congress intended Title VII to be a a remedial statute under which an award of punitive damages cannot be appropriate. The joinder of a cause under Title VII also seeking relief under Section 1981 should not alter the Congressional design calling for remedial relief in matters of employment discrimination.

The Chamber of Commerce of the United States of America is a federation consisting of over thirty-six hundred (3,600) state and local chambers of commerce and professional trade associations, and a direct business membership of over seventy-five thousand (75,000) business firms. It is the largest association of business and professional organizations in the United States.

The Chamber addresses only the first question presented by the petitioner. The Chamber neither agrees nor disagrees with regard to the importance of the other questions presented in the petition.

In order to represent its members' views on questions of importance to their vital interests and to render such assistance as it can to judicial deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of

[3] The Chamber takes no position (either in support of or in opposition to) the other questions presented by Petitioner Illinois Central.

significant equal employment and labor relations matters before the Supreme Court.[4] The Chamber, upon motion granted in the Court of Appeals did file a brief Amicus Curiae on the issue which it seeks to support the petition herein. The issues to which the Chamber directs its attention in this case—whether punitive damages are available in an action brought under Title VII, and whether if not, such damages may be obtained when the same claim is brought under Title VII and 42 U.S.C. § 1981—are of major interest to the Chamber's membership. The object of Title VII is remedial, not retributive. Employers are encouraged by the congressional design to remedy their employment practices by conciliation, mediation and persuasion. This process is three-sided, involving the EEOC, the employee(s) and the employer. Title VII has been successful largely because the changes in employment practices which emerge from the conciliation process go further to accomplish the overall goal of Title VII—equal employment opportunities—than does individual relief for past acts of discrimination. The availability of punitive damages under Title VII would interject into this process an element of uncertainty that would impair it and be destructive of the broad objective of the Act. Haggling over an appropriate amount of punitive damages could become a three-sided affair among the EEOC, employer and employee(s) that would serve to void the affirmative measures that might otherwise result from conciliation. Similarly, demands for excessive sums would yield the same result as employers, faced with such uneconomic demands, would be forced to litigate rather than conciliate. Such a result, compelled by the decision of the Court of Appeals below, is not in the interest of the Chamber's members whose resources, in a manner consistent with the ultimate goal

[4] *E.g. General Electric v. Gilbert*, 429 U.S. 125, 13 FEP Cases 1657 (1976); *McDonald v. Santa Fe*, 427 U.S. 273, 12 FEP Cases 1577 (1976); *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 42 U.S. 616 (1975); *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974); *Boy's Markets, Inc. v. Retail Clerks* 398 U.S. 235 (1970).

of Title VII, would better be allocated to the development of hiring and training programs designed to encourage minority employment at all levels of industry.

The unfortunate result compelled by the decision below is not diminished when the same claim is brought under both Title VII and Section 1981. While an employee may forego the EEOC entirely and pursue the independent avenue of relief available under Section 1981, including punitive damages, Title VII and Section 1981 are not coextensive. An employee or group of employees seeking to pursue their individual interests, including punitive and other legal damages, could frustrate the broader purposes of Title VII when these interests become intertwined. That is, there is no incentive on the part of the individual claimants to genuinely participate in the conciliation process when the failure of that process carries with it the opportunity for greater individual rewards. Since Title VII and Section 1981 are independent, an employee wishing to pursue the latter course of action should have to choose between the avenues available to him.

The issue whether punitive damages may be awarded as a remedy under the statutes involved herein is not only an important question upon which the Court has not spoken, but also one in which there is a conflict in the circuits.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS IMPORTANT QUESTIONS CONCERNING THE AVAILABILITY OF PUNITIVE DAMAGES IN AN ACTION BROUGHT UNDER TITLE VII AND SECTION 1981.

In its decision the Fifth Circuit without deciding the question of whether an award of punitive damages under Title VII alone would be proper, concluded that it is permissible when the action is joined with a claim under Section 1981. The Chamber respectfully submits that this important question has not yet been determined by this Court. The Fifth Circuit in its

opinion acknowledges that the Court, while speaking to the question in dictum in *Johnson* v. *Railway Express Agency, Inc.*, 1975, 421 U.S. 454, and 460, did not decide the question.

The rationale for the Fifth Circuit's decision seems to be based upon the erroneous view of the District Court in this case that the remedial purposes of Title VII of Civil Rights Act are contrary to the remedial purposes of the National Labor Relations Act, 29 U.S.C. Section 160(c). The Court in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975) based its decision upon the uniformity of remedies intended by Congress under Title VII and the N.L.R.A. If this case was not joined with a count under Section 1981, Albemarle would be fully dispositive of the issue. The important question of whether the addition of Section 1981 in a claim can turn what the Court has already held to be a remedial framework into a punitive framework, is the important unresolved question before the Court.

A. Punitive Damages Are Not Available Under Title VII.

In *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969), the Fifth Circuit correctly observed that a claim for backpay pursuant to Title VII "is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy . . ." *Id.* at 1125. In *U.S. v. Georgia Power Co.*, 474 F.2d 587 (5th Cir. 1973), the Fifth Circuit further held that Title VII was enacted to punish the responsible party, but to compensate the victim of discrimination. The decision below sidesteps these earlier holdings of the Fifth Circuit, which would seem to say that since the relief available under Title VII is limited to equitable remedies, legal damages such as punitive (or compensatory) awards are not available in an action brought under Title VII. That only equitable remedies, not legal damages, are available under Title VII, is confirmed by (1)an analysis of the express language of the statute and applicable principles of statutory construction; (2) a study of the legislative history and scheme of the Act; and (3) a comparison of the Title VII enforcement provision with the

analagous provision of the National Labor Relations Act.[5] While the majority of district courts and courts of appeals thus far to have considered this issue have, upon analysis of the foregoing considerations, concluded that legal damages are not available under Title VII,[6] the Court below although announcing that it pretermitts the issue, inferentially supports the rationale of the District Court which permits punitive damages under Title VII. A correct analysis of the statutory language and design of Title VII is a necessary prerequisite to deciding the "first question presented".

1. The Statutory Language Permits Only Equitable Relief

The enforcement provision of Title VII, 42 U.S.C. §2000e-5(g), provides in relevant part:

> "... the court may enjoin the respondent from engaging in such unlawful employment practices, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ... or any other *equitable* relief as the court deems appropriate." (Emphasis added)

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[5] 29 U.S.C. §160(c).

[6] *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 10 FEP Cases 239 (6th Cir. 1975) pet. for *cert.* pending, 44 U.S.L.W. 3139; *Pearson v. Western Electric Co.*, 542 F.2d 1140 1976, 13 FEP Cases 1202 (10th Cir. 1976). District Court cases holding punitive damages unavailable under Title VII include: *Jiron v. Sperry Rand Corp.*, 10 FEP Cases 730 (D. Utah 1975); *Carreathers v. Alexander*, 11 FEP Cases 475 (D. Colo. 1974); *Howard v. Lockheed-Georgia Co.*, 372 F. Supp. 854, 7 FEP Cases 671 (N.D. Ga. 1974); *Loo v. Gerarge*, 374 F. Supp. 34 (D. Haw. 1974); *Grohal v. Stauffer Chemical Co.*, 385 F. Supp. 1267 (N.D. Cal. 1974); *Van Hoomissen v. Xerox Corp.*, 368 F. Supp. 829, 6 FEP Cases 1231 (N.D. Cal. 1973); *Whitney v. Greater N. Y. Corp.*, 401 F. Supp. 1363, 13 FEP Cases 1194 (S.D.N.Y. 1975); *Waters v. Heublein, Inc.*, 12 FEP Cases 617 (N.D. Cal. 1975). But see, *e.g. Tooles v. Kellog Co.*, 369 F. Supp. 14 (D. Neb. 1972) (denying compensatory damages but permitting a claim for punitive damages); *Dessenberg v. American Metal Forming Co.*, 6 FEP Cases 159 (N.D. Ohio 1973) (no discussion of rationale); *Allen v. Amalgamated Transit Union*, 13 FEP Cases 171 (E.D. Mo. 1976) (no discussion). But see, *Allen v. Amalgamated Transit Union*, Local 788, 554 F.2d 876, 883-4, *cert. den.* 434 U.S. 891, 1977.

In reviewing this language, the Sixth Circuit rejected the availability of legal damages under Title VII, observing:

> "The catchall phrase, 'other equitable relief as the court deems appropriate', does not stand alone. It is limited, under the construction doctrine of *ejusdem generis*, to relief of the same kind as that specifically enumerated. While affirmative action may not be limited to the reinstatement or hiring of employees with or without back pay, we believe that it is limited to relief of the same general kind..." *EEOC v. Detroit Edison Co., supra.* 10 FEP Cases at 244.[7]

The Discrict court below, affirmed by the Court of Appeals, attempted to brush aside the applicability of this sound principle of statutory construction by maintaining that it is "subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating purpose." *Opinion below,* 11 FEP Cases at 813. However, analysis of the scheme of the Act—its "dominating purpose"—in light of the legislative history reveals that the lower court's characterization

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[7] A similar view is expressed in *Howard v. Lockheed-Georgia Co., supra,* 7 FEP Cases at 673:

> "This Court is of the opinion that had Congress intended Title VII to authorize actions for compensatory and punitive damages of the kind prayed for here, it would have made clear that desire. *The omission of any such provision in a statute which sets forth the types of relief which may be afforded to an aggrieved person must be deemed to have been intentional.*" (Emphasis added)

The applicability of this principle to Title VII is bolstered by the fact that when Congress amended §2000e-5(g) in 1972, it added the language "or any other *equitable relief* ..." Pub. L. 92-261 §4(a), 86 Stat. 104 (Emphasis added). At that time Title VIII provided expressly for punitive damages. Presumably, had Congress intended to make punitive damages available under Title VII, like it had done under Title VIII, it would have done so. That it did not confirms Congress' intention that legal damages would not be available under Title VII.

of punitive damages as a "detail" which can be harmonized with the Act's objectives does withstand scrutiny.[8]

2. *Punitive Damages Are Contrary To the Scheme of the Act*

The purpose of Title VII is to remove the impediments to equal employment by the most facilitous means. This purpose is a broad public one which subordinates individual interests:

> [T]hat purpose [of Title VII] may be described as one of eliminating discrimination in employment practices broadly rather than providing private causes of action to compensate individuals injured by employment discrimination."

Jiron v. Sperry Rand Corp., supra, 10 FEP Cases 730, 738 (D. Utah 1975). A similar view was expressed in *Attkisson v. Bridgeport Brass Co.,* 5 FEP Cases 919, 920 (S.D. Ind. 1972):

> "... Congress was more interested in ending discriminatory employment practices than in compensating individual losses other than for lost pay.
>
> "... The remedial intent of Title VII was to eliminate discriminatory practices rather than create a cause of action for personal injuries otherwise actionable."

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[8] The lower court further rejected the rationale set forth in *EEOC v. Detroit Edison, supra,* (that since Title VII permits only bench trials an award of punitive damages violates the constitutional right to jury), by maintaining that a judge may award such damages in a proceeding for legal relief and that since the merger of law and equity "there seems to be no reason" that a judge could not award such relief in an equitable proceeding. However, this reasoning is in error. Absent *express* statutory authority, lacking here, a court sitting in equity cannot award exemplary damages. *Swofford v. B & W, Inc.,* 337 F.2d. 406, 412 (5th Cir. 1964), *cert. denied,* 379 U.S. 962. The other cases cited by the lower court in support of its novel contention are clearly distinguishable. See, *Alexander v. Consolidated Freightways,* ____F. Supp.____, 14 FEP Cases 143 (D. Colo. 1976). The Court of Appeals clearly indicated that it adopted the rationale of the lower court on this issue.

The enforcement scheme of Title VII reflects this fundamental congressional goal. Primary responsibility for enforcement of the Act rests with the EEOC which is required to "eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion," before the institution of any court action by it.[9] Further, it is significant that an action by the EEOC precludes the right of the charging party to maintain an individual action.[10]

Thus, the limitation placed on the private right to maintain individual grievances by the 1972 amendments to Title VII, and the subordination of such interests[11] to effectuate the overall remedial purpose of the Act, cannot be gainsaid:

> "[T]he statutory inclusion of private suits by injured parties is one means by which the overall purpose of correcting such practices is achieved. However, the limited role of such private suits within the scope of Title VII evidences its purpose as a means rather than an end." *Jiron v. Sperry Rand Corp., supra,* 10 FEP Cases at 738-739.

To maintain, as do the courts below, that the injection of a private right to assert punitive damages is a mere "detail" which conforms with the objective of Title VII, flies in the face of the very design Congress so painstakingly wrought.[12]

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[9] 42 U.S.C. §2000e-5(b); 42 U.S.C. §2000e-5(f)(1).

[10] 42 U.S.C. §2000e-5(f)(1), *supra,* provides that a charging party may intervene in an action brought by the EEOC; if the EEOC fails to act or chooses not to do so, then the individual may request a right to sue notice and proceed on his own.

[11] Prior to the 1972 amendments, the EEOC had no enforcement authority.

[12] Moreover, it has been held that since punitive damages are legal and not equitable, they are not available in a class action certified under Rule 23(b)(2) FRCP. *Waters v. Heublein, Inc., supra,* 12 FEP Cases 617. Since class actions are an integral and highly effective means of effectuating the broad purposes of Title VII, it is inconsistent with those purposes to permit punitive damages and nullify the availability of equitable class relief.

The district court, now affirmed by the Court of Appeals, further sought to bolster its conclusion in this regard by taking the view that the congressionally expressed desire to make victims of discrimination "whole", could not be satisfied without the availability of punitive damages. Specifically, the court pointed to intangibles such as mental suffering and the fact that a victim of discrimination can never obtain his "rightfui place" on the seniority ladder because of some perceived prohibition against displacement of senior employees. The short answer to these objections is that the legislative history of the Title demonstrates that Congress (1) perceived the "make whole" remedy to be restricted to those components of relief incidental to the equitable remedy of reinstatement, i.e., back pay. (See *Van Hoomissen v. Xerox Corp., supra,* 6 FEP Cases at 1237-1238); (2) did *not* intend to compensate for individual intangible losses;[13] and (3) did *not* prohibit full seniority relief, including bumping of incumbent employees where appropriate. *Franks v. Bowman Transportation Co., Inc.,* 424 U.S. 747, 12

[13]

> "To go so far as to imply a compensatory damage remedy solely for this type of injury would be of doubtful propriety, particularly since the extent of congressional concern for the intangible losses of the aggrieved individual is suspect; recovery for mental suffering would be a significant departure from the NLRB practice on which the remedial provisions of Title VII were modeled.
>
> "In addition, proof of mental suffering damages is speculative at best. An award of such damages often includes elements of punishment as well as compensation and, since the measure of recovery is based on the magnitude of the plaintiff's injury rather than the degree of wrong of the defendant, might well be unjust, particularly since an intention to discriminate has not been required to find a violation of Title VII."

Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1200-1261 (1971) (footnotes omitted). See, also, *Comment: Implying Punitive Damages in Employment Discrimination Cases,* 9 Harv. Civ. Rights —Civ. Lib. L. Rev. 325, 367-368 (1974).

FEP Cases 549 (1976). A private right to damages is shown not to be reflected by congressional intent in Title VII or the amendments thereto and:

> "Consequently, specific limitations of such private actions as defined in provision 5(g) (reinstatement, back pay) are not subject to purposive expansion. In eliminating such employment discrimination Congress apparently felt that sufficient encouragement to private suits was provided in the remedies of 5(g), and a judicial raising of the stakes to increase that encouragement would go beyond the specific legislative scheme." *Jiron v. Sperry Rand Corp., supra,* 10 FEP Cases at 739.

3. Punitive Damages Are Not Available Under the Analogous Labor Act

In explaining and introducing the Civil Rights Bill, Senator Humphrey, in his address, and the floor managers, Senators Clark and Case, referred to the fact that the relief under Title VII is similar to that available under the National Labor Relations Act, *supra,* 29 U.S.C. §160(c). 110 Cong. Rec. 6549, 7212. While such statements of the bill's proponents, even though entitled to great weight, may not be conclusive, the similarity between the two Acts, and the fact that Congress knew that punitive damages were not available under the Labor Act[14] strongly suggest that no money damages other than back pay are available under Title VII. Moreover, any doubt that the availability of monetary relief under Title VII is restricted to back pay was removed by the Court in *Albemarle Paper Co. v. Moody,* 422 U.S. 405, (1975). There the Court

[14] Section 10(c) of the Labor Act, 29 U.S.C. §160(c), provides in relevant part that the Board shall issue an order "requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter." It has been settled law for decades that compensatory and punitive damages are not available under the above provision. *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 235-6 (1938).

confirmed that the remedial provisions of Title VII were *expressly patterned after the Labor Act and that nothing in the 1972 amendments to Title VII demonstrated congressional intent to "back away from the NLRA model. . ." Id.* at fn.11.

Despite these clear pronouncements by Congress and the Court as well as the virtual unanimity among the district courts and a majority of Courts of Appeal with respect, at least, to this view, the lower courts here maintain that there are "profound differences" between the Labor Act and Title VII which makes the former *express* model inapplicable to the latter with regard to the issue of punitive damages.

Boiled down to their essence, these "profound differences" reduce themselves to the contention that the availability of punitive damages under the Labor Act would undermine the negotiation process that is the cornerstone of that Act, and that no such consideration exists under Title VII. This view, must be wrong. Conference, conciliation, and persuasion—negotiation—written into the Act in 1964, and retained in 1972, remain the cornerstone of the Act.[15] The availability of punitive damages under Title VII, the haggling over sums with the exacerbation of passions and the concommitant inability to reach agreement, no less than under the Labor Act, would tend to undermine the negotiation process. To contend, as does the lower court as affirmed by the Court of Appeals, that the availability of punitive damages would encourage an end to employment discrimination could have the opposite effect and, in any event, overstates the case. The availability of such relief under the Labor Act would similarly discourage unfair labor practices, but Congress did choose to make such relief available under that Act or under Title VII which was modeled after it. Merely

[15] "The conferees contemplate that the Commission will continue to make every effort to conciliate as required by existing law. Only if conciliation proves to be impossible do we expect the Commission to bring an action in Federal district court to seek enforcement." 118 Cong. Rec. 7563 (remarks of Congressman Perkins).

because the lower court prefers to view the statute as allowing such damages, does not render it subject to such interpretation:

> "Statutes, as reflective of legislative jdugments, are not subject to strained interpretations to accommodate the preference of judges. Courts ought to be reluctant in making substantial alterations in statutory fabric, while at the same time recognizing the need to construe and apply statutes fairly and even creatively in accordance with the statutory purposes." *Jiron v. Sperry Rand Corp., supra,* 10 FEP Cases at 738.

For the foregoing reasons, the Chamber submits that punitive damages are not available under Title VII.

B. Punitive Damages are not Available to a Plaintiff who Brings the Same Claim Under Title VII and 42 U.S.C. §1981

The Chamber submits: That Title VII and Section 1981 are separate, distinct and independent even though directed to the same ends when a charge of racial discrimination is at issue: that because punitive damages (as demonstrated in the preceding section) are not available under Title VII and would be destructive of that Act's primary purposes and cannot be harmonized with those purposes, an individual seeking legal damages may not recover them in a combined action brought under both Acts; that he must choose whether to proceed before the EEOC and then, perhaps, to court under Title VII or bypass the Commission entirely, filing his claim under Section 1981.

In *Johnson v. Railway Express Agency,* 421 U.S. 454, 10 FEP Cases 817 (1975), the Court recognized that Title VII and Section 1981 were "independent" of each other and were "not co-extensive", in holding that the statute of limitations applicable to a Section 1981 cause was not tolled during the pendency of an EEOC Charge alleging the same claim. The

Court went further and made two observations of particular significance here: (1) that an individual who establishes a cause of action under Section 1981 may obtain compensatory and punitive damages, and (2) that it has been recognized that neither compensatory nor punitive damages are available under Title VII.

The Court's observations recognize the inherent disharmony between the statutes as regards the issue here under consideration, but the Court did not resolve it. Accordingly, the *amicus* subscribes to the result reached by the Sixth Circuit in *EEOC v. Detroit Edison Co., supra,* which did, and urges that result here.

There, the court held that when a Section 1981 action is joined with another action such as Title VII which specifies broad equitable remedies for those who have been injured by a violation thereof, there is no justification for enlarging those remedies to include legal relief by way of damages on the basis of Section 1981. While *Detroit Edison* was decided before *Johnson, Johnson* does not undercut the validity of the Sixth Circuit's view inasmuch as the same considerations which lead the Court to recognize the inherent area of conflict between the two Acts, underlie the Sixth Circuit's decision. That is, the Sixth Circuit expressly recognized that punitive damages are legal in nature; that an individual can bypass the EEOC entirely and proceed independently under Section 1981 to obtain individual legal damages. By its reliance on *Howard v. Lockheed-Georgia, Co., supra,* 6 FEP Cases 671, the Sixth Circuit indicated the same further awareness of the fact that if the larger rewards of punitive damages were available by resort to a combined Title VII-Section 1981 action, the broad objectives of Title VII and the parochial interests in punitive damages would be drawn into conflict with the broader objectives of Title VII frustrated, 6 FEP Cases 675.

As pointed out by the Chamber in the preceding section, the purpose of monetary relief, i.e., back pay, under Title VII, as under the Labor Act, is solely remedial, *Albemarle Paper Co. v. Moody, supra,* and punitive damages are not available under

Title VII either by way of conciliation or court enforcement. The congressional enactment of Title VII in 1964 was part of a comprehensive scheme to eradicate discrimination in this country. By devising a system which compels conciliation and makes it the cornerstone of Title VII, Congress made a determination that the objective of equal employment opportunities would best be accomplished by such means. Since the positive results which might otherwise be obtained through conciliation are subject to nullification by the availability of punitive damages if one simply can obstruct the conciliation process in the hope of obtaining greater rewards by combining a Title VII claim with a claim under Section 1981 for such damages, the congressionally chosen means would be frustrated. But, since punitive damages are available under the 1866 Act, there is disharmony between the Acts.

While the Chamber is aware of the accepted principle that the 1964 Act did not repeal the 1866 Act by implication,[16] the Chamber suggests that this disharmony be resolved by the traditional means employed by the Court when a later Act of Congress results in a conflict with earlier wisdom. Thus, in *Boy's Markets, Inc. v. Retail Clerks, supra,* 370 U.S. 235, the Court resolved the conflict between the Norris-LaGuardia prohibition[17] on injunctions against strikes in labor disputes with the Labor Act policy favoring arbitration, by carving out an exception to the older Norris-LaGuardia Act: a strike may be enjoined where the dispute which gave rise to it is subject to arbitration. There is a hundred years separating Section 1981 and Title VII, and the later Act reflects the modern legislative wisdom. Accordingly, in conformity with that wisdom, the Chamber urges that, as in *Boy's Markets,* an exception be carved here: an individual may not seek punitive damages in a combined Title VII-Section 1981 cause. If such individual wishes to pursue an individual claim for exemplary or punitive damages, he should be required to forego the EEOC and Title VII and proceed with his claim solely under Section 1981.

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[16] *Sanders v. Dobbs Houses, Inc.,* 431 F.2d 1097, 1110-1101 (5th Cir. 1970), *cert. denied,* 401 U.S. 943 (1971).

[17] *Norris-LaGuardia Act,* 29 U.S.C. §§101-115

This suggestion does no violence to the principle set forth in *Sanders v. Dobbs Houses, Inc., supra.* Rather it is consistent with

> "The legislative history of Title VII [which] manifests a congressional intent to allow an individual to pursue *independently* his rights under both Title VII and other applicable state and federal statutes." *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 7 FEP Cases 81, 85 (1974). (Emphasis added)

In *Gardner-Denver,* the Court pointed to Senator Clark's statement wherein he stated, "If a given action should violate both Title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction." 110 Cong. Rec. 7207. It is clear that punitive damages could not be obtained if a claim of racial discrimination were brought under the Labor Act—although such relief could be obtained in an independent action under Section 1981. It has been demonstrated that such damages cannot be obtained under Title VII—although such damages may be obtained independently under Section 1981. Therefore, the chamber urges the Court to adopt the view that such damages cannot be obtained in a combined Title VII-Section 1981 action.

The *amicus* does not advocate depriving any individual of damages to which he might be entitled independently under any law. Rather, the *amicus* only urges that because of the inherent conflict involved in allowing an individual to seek punitive damages brought in an action under both statutes, harmonization between the two cannot result unless it is at the expense of the broader goals sought by Title VII. Therefore, to secure the objectives of Title VII, and still permit individuals to seek legal damages for injuries they may have suffered under Section 1981, this Court should hold that the latter must be pursued separately and cannot be combined with a claim under Title VII.

II. THE CONFLICT WITHIN THE CIRCUIT COURTS OF APPEAL REQUIRES THE RESOLUTION OF THE ISSUE PRESENTED.

In its decision the Fifth Circuit acknowledges the existence of the conflict among the Circuits:

> "In so holding we join the Eighth Circuit's conclusion in *Allen* v. *Amalgamated Transit Union Local 788,* 8 Cir. 1977, 554 F.2d 876, 883-4, cert. denied, 434 U.S. 891, 98 S. Ct. 266, 65 L.Ed.2d 176, and respectfully disagree with the contrary view expressed by our colleagues of the Sixth Circuit, *EEOC* v. *Detroit Edison Co.,* 6 Cir. 1975, 515 F.2d 301, 309, vacated, 1977, 431 U.S. 951, 97 S.Ct. 2669, 53 L.Ed.2d 267.

The Chamber also agrees with the Petitioner that there is a further conflict with the decision of the Tenth Circuit in *Pearson* v. *Western Electric Co.,* 542 F.2d 1150, 1976, in agreement with the *Detroit Edison (supra)* holding of the Sixth Circuit that punitive damages may not be awarded under the statutes. Similarly, the Fourth Circuit in *Russell* v. *American Tobacco Co.,* 528 F.2nd 357 at 366, 1975, joins the position of the Sixth and Tenth Circuits.

The Chamber also respectfully urges the Court to consider this question notwithstanding its view in *Johnson* v. *Railway Express,* 421 U.S. 454, at 458 and 460. It would appear that the Court's later views in *Albemarle Paper Co.* v. *Moody (supra)* are in conflict with the dictum suggested in *Johnson* v. *Railway Express (supra),* that punitive damages might be available in an action under Section 1981. It would defeat the remedial purposes Congress intended in 1964 to be utilized in resolving questions of employment discrimination. To permit punitive damages where there is a joinder of the two causes of action would effectively prevent voluntary resolution or settlement of employment discrimination cases. The Chamber urges the Court to take this opportunity to limit *Johnson* v. *Railway Express (supra)* to questions in issue in that case.

CONCLUSION

For the reasons stated above the Chamber of Commerce of the United States of America respectfully urges the Court to grant the Petition herein and issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted

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